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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/441,035	11/16/1999	JOSEPH B. PRULLAGE	18794-000400	3784

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EXAMINER

ROWAN, KURT C

ART UNIT

PAPER NUMBER

3643

DATE MAILED: 10/17/2002

Please find below and/or attached an Office communication concerning this application or proceeding.

<b>Office Action Summary</b>	Application No. <b>09/441,035</b>	Applicant(s) <b>PRULLAGE</b>	
	Examiner <b>KURT ROWAN</b>	Art Unit <b>3643</b>	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

**Period for Reply**

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136 (a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.  
 - If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.  
 - If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.  
 - Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).  
 - Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

**Status**

1)  Responsive to communication(s) filed on Jul 30, 2002

2a)  This action is FINAL.      2b)  This action is non-final.

3)  Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11; 453 O.G. 213.

**Disposition of Claims**

4)  Claim(s) 1-4, 7-10, and 12-35 is/are pending in the application.

4a) Of the above, claim(s) \_\_\_\_\_ is/are withdrawn from consideration.

5)  Claim(s) \_\_\_\_\_ is/are allowed.

6)  Claim(s) 1-4, 7-10, and 12-35 is/are rejected.

7)  Claim(s) \_\_\_\_\_ is/are objected to.

8)  Claims \_\_\_\_\_ are subject to restriction and/or election requirement.

**Application Papers**

9)  The specification is objected to by the Examiner.

10)  The drawing(s) filed on \_\_\_\_\_ is/are a)  accepted or b)  objected to by the Examiner.  
 Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).

11)  The proposed drawing correction filed on \_\_\_\_\_ is: a)  approved b)  disapproved by the Examiner.  
 If approved, corrected drawings are required in reply to this Office action.

12)  The oath or declaration is objected to by the Examiner.

**Priority under 35 U.S.C. §§ 119 and 120**

13)  Acknowledgement is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).  
 a)  All b)  Some\* c)  None of:  
 1.  Certified copies of the priority documents have been received.  
 2.  Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.  
 3.  Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\*See the attached detailed Office action for a list of the certified copies not received.

14)  Acknowledgement is made of a claim for domestic priority under 35 U.S.C. § 119(e).  
 a)  The translation of the foreign language provisional application has been received.

15)  Acknowledgement is made of a claim for domestic priority under 35 U.S.C. §§ 120 and/or 121.

**Attachment(s)**

1) <input type="checkbox"/> Notice of References Cited (PTO-892) 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) 3) <input checked="" type="checkbox"/> Information Disclosure Statement(s) (PTO-1449) Paper No(s). <u>19</u>	4) <input type="checkbox"/> Interview Summary (PTO-413) Paper No(s). _____ 5) <input type="checkbox"/> Notice of Informal Patent Application (PTO-152) 6) <input type="checkbox"/> Other:
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## **DETAILED ACTION**

### ***Drawings***

1. This application has been filed with informal drawings which are acceptable for examination purposes only. Formal drawings will be required when the application is allowed.
2. The drawings are objected to under 37 CFR 1.83(a). The drawings must show every feature of the invention specified in the claims. Therefore, the attractant reservoir must be shown or the feature(s) canceled from the claim(s). No new matter should be entered.

### ***Claim Rejections - 35 U.S.C. § 103***

3. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

4. Claims 1, 12, 26-27, 31, 33-34 are rejected under 35 U.S.C. 103(a) as being unpatentable over Pfeiffer.

The patent to Pfeiffer shows an insect bait station for attracting and killing insects such as flies having a body 15 with an external groove 17. In reference to claims 1, 27, 31, 33, Pfeiffer shows the external groove which extends spirally around the body. Inherently, there is a longitudinal component to the groove but overall the groove is more horizontal. However, it would have

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been obvious to employ other shapes of grooves such as longitudinal since the function is the same and no stated problem is solved. In reference to claim 12, Pfeiffer discloses hanger members in lines 76-85 of page 2. The pesticide used by Pfeiffer is self-adhering since it stays in the groove.

***Claim Rejections - 35 U.S.C. § 103***

5. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

6. Claims 2-4, 7-10, 13-25, 28-30, 32, 35 are rejected under 35 U.S.C. 103(a) as being unpatentable over Pfeiffer as applied to claim 1 above, and further in view of Conlee for substantially the same reasons stated in the first Office Action.

The patents to Pfeiffer and Conlee show insect bait stations. Pfeiffer shows a conical shape and has been discussed above. Conlee shows a cylindrical body. In reference to claims 2-3, 29, 32, 35, it would have been obvious to form the body of Pfeiffer as a cylinder as shown by Conlee since merely one equivalent shape is being substituted for another. In reference to claims 4, 7, Pfeiffer shows an elongated circumferential spiral groove that has a height at least two times larger than the width of the groove. In reference to claim 8, Pfeiffer shows a plurality of grooves 17b in Fig. 11. In reference to claims 9-10, Conlee does not disclose the size of the

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cylinder, but it would have been obvious to make the cylinder with a diameter from about 1/4 inches to about 2 inches and about 6 inches to about 18 inches in length since the size would be determined through routine experimentation. In reference to claims 13-14, neither Pfeiffer or Conlee disclose how the bait stations are made. However, it would have been obvious to extrusion mold or injection mold the bait station since both molding methods are old and well known in the art. The examiner takes Official Notice that extrusion molding and injection molding are old and well known. In reference to claims 15-19, and 35, Pfeiffer and Conlee do not disclose the insecticide or pesticide used, but it would have been obvious to employ an known fast acting pesticide such as phenyl pyrazole. However, Pfeiffer discloses a viscous liquid. In reference to claims 20, 21, 23, Conlee discloses a pest attractant reservoir for a pheromone 8 inside the body. In reference to claim 22, it would have been obvious to provide Pfeiffer with an attractant affixed to the hanger since the location of the attractant is a matter of design choice since the function is the same. In reference to claim 24, Pfeiffer and Conlee do not disclose feeding attractants, but it would have been obvious to employ a feeding attractant since merely one attractant is being substituted for another. The examiner takes Official Notice that feeding attractants are old and well known. In reference to claim 25, Pfeiffer and Conlee do not disclose a cylinder sheath to store and transport the bait station, but it would have been obvious to employ a cylindrical sheath to transport the bait station so the poison does not come into contact with nontarget species. In reference to claim 28, Pfeiffer shows several different groove configurations such as a spiral groove and a plurality of horizontal grooves vertically aligned. It would have

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been obvious to employ a plurality of vertical grooves since the exact groove structure is a matter of design choice to be determined by routine experimentation. In reference to claim 30, both Pfeiffer and Conlee do not disclose the groove area as a percent of the total surface area of the external surface, but it would have been obvious to employ a 30 percent groove area since the groove area would be determined through routine experimentation.

*Response to Amendment*

7. The declaration under 37 CFR 1.132 filed July 30, 2002 is insufficient to overcome the rejection of claims 1-4, 7-10, 12-35 based upon 35 U.S.C. 103 over Pfeiffer or Pfeiffer in view of Conlee as set forth in the last Office action because: the declaration fails to set forth facts such as in paragraphs 7, 8 and 9, and the facts presented are not germane to the rejection at issue such as paragraphs 6 and 12-17. The declaration states that Conlee uses a contact poison, but the present invention uses an oral toxicant. Claims 1, 31, 33 merely recite a pesticide. The declaration states that the inventive design minimizes human contact but that Pfeiffer maximizes human contact. However, no evidence is submitted to prove this and the claims do not mention human contact. The declaration also states that a curved surface of the inventive design catches more flies than a flat surface and shows test results. However, both Conlee and Pfeiffer show curved surfaces and not evidence was submitted comparing the inventive design with Conlee and or Pfeiffer.

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8. In view of the foregoing, when all of the evidence is considered, the totality of the rebuttal evidence of nonobviousness fails to outweigh the evidence of obviousness.

***Response to Arguments***

9. Applicant's arguments filed July 30, 2002 have been fully considered but they are not persuasive. Applicant argues that Pfeiffer shows steps and troughs and that the troughs are horizontal. Applicant further argues that Pfeiffer requires that the insecticide be poured onto the cone prior to deployment and use. However, there is no reason that the insecticide needs to be poured prior to deployment. The insecticide needs to be poured before use such as with the present invention. Pfeiffer can be handled by the bottom 16 without coming into contact with the insecticide. Pfeiffer further shows a longitudinal groove and that the insecticide is self adhering since some remains in the upper groove 17. The groove shown by Pfeiffer in Fig. 3 is not horizontal since it spirals down. In regard to the second rejection, the insecticide of Pfeiffer can be considered to be self adhering since it is viscous. See page 2, line 14. The combination of Pfeiffer as modified by Conlee shows a longitudinal groove since Pfeiffer clearly shows a longitudinal groove in Figs. 4 and 6. In response to applicant's argument that there is no suggestion to combine the references, the examiner recognizes that obviousness can only be established by combining or modifying the teachings of the prior art to produce the claimed invention where there is some teaching, suggestion, or motivation to do so found either in the references themselves or in the knowledge generally available to one of ordinary skill in the art.

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See *In re Fine*, 837 F.2d 1071, 5 USPQ2d 1596 (Fed. Cir. 1988) and *In re Jones*, 958 F.2d 347, 21 USPQ2d 1941 (Fed. Cir. 1992). In this case, the knowledge is generally available to one of ordinary skill in the art since merely one equivalent shape is being substituted for another and the function is the same. By changing the shape to a cylinder the only difference is that the longitudinal groove would be vertically aligned or in Fig. 9 of Pfeiffer, the ledges 17a would have the same diameter. In response to applicant's argument that the examiner's conclusion of obviousness is based upon improper hindsight reasoning, it must be recognized that any judgment on obviousness is in a sense necessarily a reconstruction based upon hindsight reasoning. But so long as it takes into account only knowledge which was within the level of ordinary skill at the time the claimed invention was made, and does not include knowledge gleaned only from the applicant's disclosure, such a reconstruction is proper. See *In re McLaughlin*, 443 F.2d 1392, 170 USPQ 209 (CCPA 1971).

### *Conclusion*

10. **THIS ACTION IS MADE FINAL.** Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period

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will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

11.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to KURT ROWAN whose telephone number is (703) 308-2321.

The examiner can normally be reached on Monday-Thursday from 6:30 a.m. to 5:00 p.m.

The fax phone number for the organization where this application or proceeding is assigned is (703) 306-4195 or (703) 305-3597.

Any inquiry of a general nature or relating to the status of this application or proceeding should be directed to the receptionist whose telephone number is (703) 308-1113.

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*Kurt Rowan*

KURT ROWAN

PRIMARY EXAMINER

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October 16, 2002